IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

MADAN LAL Vs. SUKH RAJ @ SUKH RAM

S.B.CIVIL SECOND APPEAL No.460 of 2005

Date of judgment : 09 October,2006

PRESENT
HON'BLE SHRI N P GUPTA,J.

Mr. S.C.Maloo, for the appellants.
Mr. V.L.Thanvi, for the respondents.

BY THE COURT:

This appeal has been filed by some of the defendants, against the judgment and decree of the two learned courts below, decreeing the plaintiff's suit for redemption.

According to the plaintiffs the property in question were mortgaged by the plaintiffs' ancestor Punoji, in two installments, by executing two mortgage deeds, one dated 8.12.48, for a sum of Rs. 4999/-, and the other dt. 20.1.1950, for Rs. 5499/-, by way of usufructory mortgage, with the stipulation to pay interest @ 12 Aana per month per hundred, giving liberty to the mortgagee to let out the property, in which event, the amount of rent was to be adjusted, against the interest. Mortgage deeds are registered ones. It is alleged by the plaintiff, that

though the property was not let out by the defendant, but both the property could fetch a monthly rent of Rs. 50/- each, which totals to Rs. 51,900/- upto date of suit, and after adjusting this amount against the interest and principal amount, a total sum of Rs. 4319/- remains outstanding, and the plaintiffs are entitled to redeem the property by paying the said amount. Certain other allegations were made, and reliefs were claimed.

Some of the defendants filed joint written statement contesting the suit, and contending that all the legal representatives and heirs of the alleged mortgagor Punoji have not been impleaded as party. Likewise all the heirs and legal representatives of mortgagee have also not been impleaded as party, therefore, the suit is not maintainable. The factum of mortgage was denied, and it was pleaded, that the property was purchased by Laxmanji himself, and he was in possession since long as owner. The details of the boundaries and apartments were denied, and it was contended, that the defendant has been paying house tax in his own name, and has obtained electricity and water connection. It was pleaded, that the property never belonged to Punoji, nor belongs to plaintiffs, rather for the last 50 years the defendants are maintaining the property, and occupying as owner, and the plaintiff is not entitled to any rent or any adjustment. The defendants have spent thousands of rupees on this property, as owners, and

plaintiff never objected. It was also contended, that the suit is not in accordance with the proforma, being Form No. 45 and 46 of Appendix A, appended to C.P.C.

The plaintiff filed a rejoinder, maintaining the averments of the plaint, and denying the averments of the defendants. The learned trial court framed as many as 14 issues. Issue no.1 to 4 are about the two mortgages, and their stipulations, then issue no. 5 and 6 are about likely income of the property, and the plaintiffs' entitlement to adjustment, then issue no. 7 and 8 relate to L.Rs. of mortgagee and mortgagor, being necessary party, and in their absence suit being not maintainable. Then, issue no. 9 relates to court fees, issue no. 10 relates to question about defendants having become owner by adverse possession. Then, issue no. 11 relates to the non-maintainability of the suit for non-compliance of O. 34 Rule 1 and 4, issue no. 12 relates to entitlement of the defendant to compensatory cost, while issue no. 14 relates to jurisdiction of the court to hear the matter, and issue no. 13 relates to relief.

After completing the trial, the learned trial court decreed the suit. Issues no. 9 and 14 were decided against the defendant as preliminary issues, which order was challenged by way of revision, wherein the defendant was given liberty to assail those orders in appeal.

Regarding mortgage deeds, vide order dt. 24.5.97, the plaintiff was given permission to lead secondary evidence, and the learned trial court decided issues no. 1 and 4 in favour of the plaintiff, holding that the creation of mortgage is proved. Then, issues no. 2 and 3 were also decided in favour of the plaintiff, according to which the rate of interest was agreed at 12 Aana per month per hundred, and that it was stipulated, that the rent accrued on premises shall be adjusted against the interest. Then, issue no. 5 was decided in the manner, that the properties could yield Rs. 20/- and Rs. 35/- per month, which the plaintiffs are entitled to adjust. Then, accordingly issue no. 6 was decided in view of the decision of issue no. 5. Then, issues no. 7 and 8, relating to necessary party, was also decided in favour of the plaintiff, holding that remaining L.Rs. have been brought on record as legal representatives, and therefore, this technical defect has been cured, and it would not be justified to dismiss the suit on that count. Then, issue no. 10 was decided by holding, that defendants have not been able to establish their adverse possession, as the factum of mortgage has been proved, and the plaintiffs have the documents of their title, and till the mortgage is redeemed, the defendants are not entitled to claim adverse possession. Then, deciding issue no. 11, it was held, that the suit has been filed in accordance with law, and in any case if there is any technical defect, the suit cannot be dismissed on that

count. Obviously in view of the findings on various issues, issue no. 12 was decided against the defendants. Thus, the suit of the plaintiffs was decreed, and a preliminary decree was passed, directing the plaintiffs to deposit the amount upto 7.3.2002, and in the event of failure of the plaintiffs to do so, the defendants would be entitled to apply for final decree for sale of the property, and in the event of plaintiffs depositing the amount, the plaintiffs will be entitled to apply for final decree of redemption.

In appeal the learned lower Appellate Court, after recapitulating the facts, formulated five points for determination; first being about factum of mortgage, second being about necessary parties, third related to defendants' plea of adverse possession, fourth related to jurisdiction, and fifth related to compliance of provisions of O. 34 Rule 7 C.P.C., and decided the point no.1, holding, that the mortgage is proved. Then, deciding point no.2, relying upon the judgment of this court in 1977 WLN (UC) -368, held, that daughters are not necessary parties, apart from the fact, that they have been brought on record as legal representatives. Then, in view of the decision of point no.1, point no. 3 was decided against the defendant. Then, points no. 4 and 5 were also decided in favour of the plaintiff, and thus the appeal has been dismissed.

The plaintiffs appeared before this court in this case as caveator, and vide order dt. 8.8.2006 record of the learned courts below was requisitioned, and on 19.9.2006 at the request of the learned counsel for the parties, the appeal was heard, with a view to decide it finally.

Assailing the impugned judgments and decrees, it was contended by the learned counsel for the appellant, that in the present case, the mortgage is not proved. Elaborating the argument it was submitted, that there is no evidence on record to prove the mortgage deeds, and merely because the two documents have been marked as Ex. 2 and 3, it cannot be said that the documents are proved. Reliance in this regard was placed on the judgments of Hon'ble the Supreme Court in Ramji Dayawala & Sons (P.) Ltd. Vs. Invest Import, reported in AIR 1981 SC-2085, and State of Karnataka Vs. State of A.P., reported in AIR 2000 SC 3511 (1). It was submitted, that the plaintiff has clearly admitted, that he was two years of age at the time when the document was executed, and he has not proved the writing or signatures of the executant, attesting witnesses have also not been produced, and even the mother of the plaintiff, who was alive at that time, has also not been examined, and thus the learned courts below were in error, in finding the mortgage deed to be proved. The other submission made was, that the heirs and legal representatives of the mortgagor and mortgagee are necessary parties in a suit for

redemption, according to provisions of O. 34 Rule 1 C.P.C., but they have not been impleaded as parties, and therefore, the suit could not be maintained. It was also submitted that simply because on death of some of the defendants and plaintiffs, they were impleaded as heirs, cannot cure the defect, inasmuch as, in that event, their capacity was that of heir and legal representatives of the deceased, and they were not parties in their independent status, with the result, that the suit could not be maintained, and was liable to be dismissed. Reliance in this regard was placed on the judgment of Andhra Pradesh High Court, in P. Govinda Reddy Vs. Golla Obulamma, reported in AIR 1971 A.P.-363, the judgment of Patna High Court, in Rameshray Mahto Vs. Amiri Mahto, reported in 2005 AIHC-4362. This Rameshray's case was relied upon, to contend that merely because the other heirs of mortgagee and mortgagor were brought on record as heirs, that cannot cure the defect, as the difference between impleadment, originally, and as heirs, was laid down in this case. Then, reliance was placed on the judgment of Hon'ble the Supreme Court, in Khetrabasi Biswal Vs. Ajaya Kumar Baral, reported in (2004) 1 SCC-317, wherein Hon'ble Supreme Court held, that where necessary party has not been impleaded as party in a writ petition, the order passed is nullity, and has no binding effect. Then, on the authority of the judgment of this Court, in Jugal Kishore Vs. Ram bux, reported in 1985 RLW-482, it was contended, that non joinder of necessary party cannot be

regarded as a formal defect, rather such a defect is fatal to the suit. Reliance was also placed in this regard, on another judgment of this Court, in Laxmi Narayan Vs. Poonam Chand, reported in 1998(2) RLW-1186. It was then contended that the learned trial court had no jurisdiction to entertain the suit, inasmuch as, admittedly the premises was not let out by the defendant, and even according to Ex.2 and 3, the stipulation was, that the mortgagor was liable to pay interest, and only if the premises are let out, then the rent earned would be adjusted, and in the present case, since admittedly the premises were not let out, the mortgagor was liable to pay interest, which even according to the plaintiff, comes to Rs. 51,900/-, and therefore, the suit could not be maintained before the learned trial court. Reliance in this regard was placed on a Full Bench judgment of Travancore High Court, in Ouseph Ouseph Vs. Souriyar Thomman, reported in AIR 1954 Tra.Co.-473. It was then contended, that the suit has been filed including a shop, while it has clearly been established on record, that the shop was purchased by the defendants, vide Ex. A-1, and therefore to that extent the decree is liable to be set aside. It was then contended, that the learned trial court had framed as many as 14 issues, and had decided the matter issue-wise, while the learned lower Appellate Court has not decided all the issues settled by the learned trial court, and on that ground alone, the impugned judgment is liable to be set aside. For this

reliance was placed on the judgment of this Court, in Kailash Giri Vs. Akhey Giri, reported in 2006(1) WLC(Raj.)-615.

Learned counsel for the respondents, on the other hand, supported the impugned judgments, and submitted, that the plaintiff was given permission to lead secondary evidence, wherein the plaintiff had proved Ex. 2 and 3. That apart the factum of mortgage is clearly proved even by Ex. A-1, whereby the defendants claim to have purchased the shop, inasmuch as, therein it is clearly recited therein, that the property in question belongs to Punoji, and is in possession of the purchaser as mortgagee. Then, relying upon judgment of this Court, in Nandlal Vs.Smt. Shanta reported in 1977 WLN(UC)-368, and Laxmi Naraian Vs. Kalyan reported in AIR 1960 Raj.-1, it was contended, that the suit can be maintained even if some of the heirs of the deceased mortgagee or mortgagor is/are not impleaded as party. Then, regarding pecuniary jurisdiction of the learned trial court, it was contended, that the defendant has not shown, that on that count it has occasioned any consequent failure of justice, therefore, on that ground suit could not be dismissed. Learned counsel then conceded, that the shop cannot be redeemed as it is a property purchased by the defendant by registered sale deed, even though it is included in the document of mortgage, and then regarding adjustment of likely amount of rent also, he has

conceded, that in view of the stipulations of mortgage deed, unless the property was let out, the mortgagor cannot claim any credit, on the basis of potential income of the premises. He also conceded, that the mortgagor is prepared to pay the entire interest, on the entire mortgage amount, at the stipulated rate, along with the principal amount, to redeem the property. It was also maintained that the suit is in accordance with form no. 45 and 46 of Appendix-A to C.P.C.

I have considered the submissions, and have gone through the various judgments cited at the bar, and have gone through the records.

At the outset I am constraint to observe, that even before going into merits of the contentions of the learned counsel for the parties, raised by both the learned counsel, the preliminary decree, as passed by the learned courts below, cannot be maintained, inasmuch as, even according to the plaintiff, the mortgage is usufructory mortgage, and the learned trial court has directed, that in the event of plaintiff's failure to pay the amount within time, the defendant will be entitled to apply for final decree for sale of the property. As against which, a look at the provisions of O. 34 Rule 7 shows, that according to Clause (C)(2) thereof, the defendant is entitled to apply for such a final decree, only in case of **mortgage <u>other</u>**

than usufructory mortgage, and thus that part of decree cannot be sustained. The direction has only to be, that in the event of plaintiffs' failure to pay the amount, his suit is to stand dismissed, and in case of mortgage by conditional sale or anomalous mortgage, the plaintiff is to stand debarred from all rights to redeem the property. Thus, this part of the preliminary decree is wholly unsustainable, and even the learned lower appellate court has not adverted itself towards this aspect of the matter. On that ground, to this extent itself, the impugned decrees are set aside. Obviously, this is consequent upon substantial question of law, being as to whether part of preliminary decree is in accordance with the provisions of O. 34 Rule 7 C.P.C.

Then, in view of the concession of the learned counsel for the respondent, about the shop being not capable of being included in the decree for redemption, so also about the plaintiff being not entitled to claim credit of likely income of the property, so also about the plaintiff being agreeable to pay interest on the principal amount at the stipulated rate, this part of the impugned decree is also required to be, and is set aside.

Now, I take up the submissions of the learned counsel for the appellants on merits.

So far as the objection about non-maintainability of the suit, for want of impleadment of heirs and legal representatives of the mortgagee and mortgagor is concerned, it is of course true, that simply because heirs are impleaded subsequently, under O. 22 Rule 3 or 4, would not cure the defect, if the suit is otherwise defective for their non-impleadment. Likewise, if they are necessary parties, the defect is not formal. In that view of the matter, I need not discuss the various judgments cited by the learned counsel for the appellant. However, the question still remains, as to whether the heirs were necessary parties, and for their non-impleadment the suit was liable to be dismissed. Of course, the Full Bench of Andhra Pradesh High Court, in P.Govinda Reddy's case took this view, but in my view, on the face of the Full Bench judgment of this Court in Laxmi Narain's case (AIR 1960 Raj.-1) with all humility at my command, I am bound to follow the Full Bench judgment of this Court. Learned counsel invited my attention to the proviso appended to O. 1 Rule 9 C.P.C., according to which the provisions of O. 1 Rule 9 do not apply to non joinder of necessary party, but then, what is significant to note is, that this proviso was inserted by C.P.C. Amendment Act, 1976, which commenced from 1.2.1977, while the present suit has been filed as early as on 13.10.76, by which time the proviso did not exist, and interpreting the provisions of law, as they then existed, Full Bench of this Court in Laxmi Narain's case,

in para-28 has held, that the plaintiffs are entitled to redeem the disputed shop, even when the L.Rs. of the mortgagor have not been brought on record. Accordingly, this contention of the learned counsel for the appellants has no force, and is repelled.

Then, coming to the objection about lack of pecuniary jurisdiction in the learned trial court, in this regard, firstly I may refer, and rely upon the provisions of Section 32(7) of the Rajasthan Court Fees & suits Valuation Act. According to which, read with sub-section (4), the fee is to be computed on the amount of entire mortgage, and according to the plaintiff he has mentioned the amount, which he is liable to pay, and defendant did not claim any other amount to be payable, therefore, on that valuation, the suit was rightly filed before the learned trial court. This is one aspect of the matter. The other more important aspect is, that a look at the provisions of Section 21 C.P.C. shows, that according to sub-section (2) thereof, such objection, as to the competence of the court, with reference to pecuniary limits of its jurisdiction, cannot be allowed to be raised, unless there has been a consequent failure of justice. In the present case though the objection was raised on the first available opportunity i.e. before settlement of issues, but then, it has not at all shown to have occasioned any "consequent failure of justice". Therefore, this objection

cannot be maintained now, though in revision, this Court left it open to the defendant to raise this objection in appeal, but then the objection can be entertained, only if, it falls within the permissible parameters, as laid down in Section 21 C.P.C.

Then, I come to most crucial question, and argument, raised by the learned counsel for the appellant, about the factum of mortgage, being not proved. Of course, the legal proposition, as propounded in the two judgments of Hon'ble the Supreme Court, in Ramji Dayawala's case and State of Karnataka's case, admit of no doubt, but then, the facts of the present case are materially different. One aspect of the matter is, that in the present case the plaintiff demanded original mortgage deed from the defendant, and served the notice, but the defendant refused to be having any such document, thereupon the plaintiff applied for permission to lead secondary evidence, which was duly granted. That granting of permission to lead secondary evidence is not under challenge, and in such secondary evidence, the certified copies of the two registered mortgage deeds, were produced as Ex. 2 and Ex.3, and by oral evidence, the plaintiff had deposed the property to have been mortgaged, as per the two mortgage deeds, with the stipulations contained therein, and in rebuttal, there is only word of mouth, about the property being belonging to Laxmanji. It is a different story, that

in this regard, as noticed by the learned trial court, there are varying versions, as to whether the property is in their possession, as adverse possession, or was in possession of Laxmanji since ancestors, or was purchased by Laxmanji, the fact does remain, that the stand of the two rival parties was; the plaintiffs' stand being, about the property being mortgaged with the defendant, while the defendants' stand being, about the property being belonging to Laxmanji, having purchased by him, or being ancestral, or the like. In that view of the matter, the other aspect of the matter comes in, viz., that the civil litigation is to be decided more on the basis of preponderance of probabilities, than on the basis of strict proof. If considered from that stand point, the document Ex.A-1 produced by the defendant himself, is a million dollar material against the defendants; inasmuch as, a look at Ex.A-1, whereby the defendant had purchased the shop, and is a registered sale deed, shows, that while describing boundaries of that shop, at item no. 2 it is mentioned as under:-

"दुकान में पेस्ता जीवणी तरफ उत्तर में पुनो वल्द पिरू रो मकान है"

This Punoji is the ancestor of the plaintiffs, the mortgagor. Then, at page-2, at the bottom, and beginning of page-3, it is recited as under:-

"यह उक्त दुकान चुन्नीलाल किसना जो पूना पिसरान पिरूजी गॉंचीयान का मौरूसी मकान का हिस्सा है और उन्हौंने पूरा मकान मय इस दुकान के आपके पास रहनबिल कब्ज रख कर कब जआपका करा दिया है सो इस तरह से आपका कब जाघला आ रहा है"

This document, Ex. A-1, is of 8.7.1955, while the two mortgage deeds are of 1949 and 1950. The defendant is very much bound by these recitals, as, if the property was not in his mortgage, he would not have allowed these recitals to be made, and thus, on preponderance of probabilities, it is clearly established, that the entire house, including the shop, was in mortgage. Thus out of the conflicting stands of the parties the stand of the plaintiff, about the property being mortgaged is established. Then by virtue of Section 74(2) read with Section 77 of the Evidence Act, the certified copies of registered mortgage deeds, being Ex. 2 and 3 are clearly admissible. According to Section 77, even the contents of the documents, or part of the documents, is proved by production of certified copy of such document. Then it is not the case of the defendant, even in the alternative, that the deeds are forged, or have been unilaterally made for ulterior purposes, or that the mortgage recited in Ex. A-1 is or are any other mortgage/s. Thus, I do not find any error on the part of the learned courts below in finding the two mortgage deeds to be proved.

I now take up the objection about error on the part of the learned court below in not deciding the appeal issue-wise. Of course, it has been held in Kailash Giri's case, that it was not open to the learned court below not to decide all the issues settled by the learned trial court. Of course, in Kailash Giri's case the matter was remanded back to the first Appellate Court. However, since I have heard learned counsel for the parties threadbare, and have gone through the record, in view of the provisions of O. 41 Rule 24, it is open to me to decide the matter, on the basis of the material on record.

Of course in the foregoing paras I have also dealt with the matter, taking up the contentions, raised by the learned counsel for the parties, and not issue-wise, but the conclusions, flowing from above discussion is, that issues no. 1 to 4 stand decided in favour of the plaintiffs, while issue no. 5 stands decided in the manner, that the plaintiff is not entitled to any adjustment of potential income of the property, issue no. 6 stands decided in the manner, that the plaintiff is entitled to redeem the property, only on paying entire principal amount, along with interest at stipulated rate, and then issue no. 7, 8, 9 & 14 are also decided against the defendants, obviously issues no. 10 and 12 also stand decided against the defendants. Regarding issue no. 11, of

course, the contention was raised, that the suit is not in accordance with the provisions of O. 34 Rule 1 and 4, but then it was not pointed out, as to what is lacking. Of course, the effect of non-impleadment of party, already stand covered by issues no. 7 and 8. Thus, all the issues stand decided in the above manner.

Consequently, the appeal is partly allowed, and the suit of the plaintiff for redemption is partly decreed, and the preliminary decree is passed in the manner, that the plaintiff should deposit the entire principal mortgage amount, along with interest, at the rate stipulated in Ex. 2 and Ex. 3, within a period of four months from today, in the learned trial court, and on depositing such amount, the plaintiff would be entitled to apply for final decree in accordance with O. 34 Rule 8, for redemption, including possession of the property, detailed in the two mortgage deeds, excluding the shop covered by Ex.A-1, and in the event of plaintiffs' failure to deposit the amount, as above, the plaintiffs' suit will stand dismissed. In the event the suit happens to stand dismissed, the defendants will be entitled to the cost of litigation through-out, else the cost will be easy throughout.

(N.P.GUPTA),J.